Supreme Court, U.S.
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NO. 051261

IN THE SUPREME COURT OF THE
UNITED STATES

ARNOLD JOE ALFORD

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER UNITED STATES SENTENCING GUIDELINE §5K1.1 IS AVAILABLE TO A DEFENDANT WHO COOPERATES WITH THE GOVERNMENT IN A CIVIL PROCEEDING.

II. WHETHER A PRE-*BLAKELY* WAIVER OF RIGHT TO APPEAL IS INVALIDATED BY A PRESERVED *BLAKELY* OBJECTION AT SENTENCING.

THE PARTIES

The caption in this case contains the name of all parties.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Arnold Joe Alford's Petition for a Writ of Certiorari

On August 24, 2005 the United States Court of Appeals for the Tenth Circuit affirmed the Judgment of the United States District Court Order of the United States District Court for the Northern District of Oklahoma and is reported at 2005 U.S. App. LEXIS 18237. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3553(e) U.S.S.G. 5K2.0 US.S.G. 5K1.1

OPINIONS BELOW

Appendix A

1. Opinion of the Tenth Circuit Court of Appeals, dated August 24, 2005.

STATEMENT OF THE CASE

Alford was arrested on September 29, 2003. He was named in a two count indictment filed in the United States District Court for the Eastern District of Oklahoma on September 18, 2003. Specifically, Count One charged

States District Court for the Eastern District of Oklahoma on September 18, 2003. Specifically, Count One charged that on or about April 12, 2002, Alford knowingly and intentionally possessed Pseudoephedrine and the same to be used to manufacture methamphetamine in violation of 21 U. S. C. §841(c)(2). Count Two charged that on or about December 18, 2002 Alford knowingly and intentionally possessed with intent to distribute methamphetamine in violation of 21 U.S.C. §841(a)(1). Alford entered a plea of not guilty and was released on a $10,000 unsecured bond.

On November 24, 2003 he entered a plea of guilty to Count One of the indictment and was taken into custody at that time. In exchange for his plea agreement the Government agreed to dismiss Count Two. There was also a cooperation agreement entered into.

Alford's base offense level was set at 38 based for possession of three (3) kilograms or more of Pseudoephedrine. He also received a two level increase for possession of a firearm pursuant to U.S.S.G. 2D1.1, resulting in an aggregate base level of 40. Pursuant to U.S.S.G. 3E1.1 he received a three level reduction for acceptance of responsibility resulting in a total base offense level of 37. His Criminal History Score was established at I and his guidelines were established at 210 to 262 months. Alford was sentenced on August 6, 2004. Pursuant to the Sentencing Guidelines he received 210 months. He is presently in custody. A timely appeal was filed. The Tenth Circuit Court of Appeals affirmed his conviction on August 24, 2005.

STATEMENT OF FACTS

On November 24, 2003 Alford was represented by Warren Gotcher and entered a change of plea. The Government was represented by AUSA Jeff Gallant. The

plea was entered before a United States Magistrate Judge.

The Court went through questions to determine that Alford was competent to enter a guilty plea. In response to a question about the medications Alford is on, which were numerous, the Court inquired as to whether any of the drugs he was taking would affect his ability to go through the process and understand what he was doing and his response was "yes". There were no follow-up questions by the court. Attorney Gotcher represented that he thought his client was mentally competent and understood the charges against him. The Court found that he was competent to enter a guilty plea.

The Government was called upon to estimate the sentencing guidelines and indicated that they would be 168 to 210 months. Defense Counsel agreed. Alford entered a plea of guilty to Count One. The Court advised Alford of the waiver of his constitutional rights in entering a guilty plea. AUSA Gallant was called upon to outline the terms of the plea agreement. Specifically he states: "The terms of the plea agreement are the Defendant agrees to plead guilty to Count One of the indictment; the Government will dismiss Count 2 at or near the time of the sentencing; **the Defendant agrees to cooperate and the Government will file for a motion for downward departure as outlined in the plea agreement**. Thirdly, there has been a handwritten change on page 5. The last sentence of paragraph 8 has been struck out of the plea agreement and the attorney has signed indicating that it is the intent that the sentence be removed. And finally the plea agreement does contain a waiver of appellate rights. Those are the essential terms of the plea agreement and we would ask that it be filed at this time as well." (emphasis added)

FACTUAL BASIS FOR THE PLEA

The Defendant stated that he possessed Pseudoephedrine knowing that it was going to be used to manufacture methamphetamine. This occurred in about 2003. This was the factual basis to accept the guilty plea and it was made knowingly, voluntarily and with his understanding of the charges against him and the consequences of his plea. Alford was detained pursuant to the provisions of his plea agreement and the mandatory detention requirements of U. S. Code 3143(a)(2). He was remanded to custody.

August 6, 2004 Alford appeared for sentencing with Attorney Warren Gotcher and newly retained counsel Susan G. James. The Government was represented by Paul Hess, Assistant United States Attorney.

New counsel brought to the Court's attention that there had been a new dispute with regard to cooperation offered by Alford and that Mr. Gotcher now was a necessary witness in the case not merely a lawyer. Gotcher made an oral motion to withdraw as attorney of record for Alford making reference to final negotiations "yesterday". The Court allowed him to withdraw. Alford referenced the *Blakely* decision and specifically objected to the firearm enhancement pursuant to *Blakely*. *Blakely* was released several months after Alford's plea. Counsel for Alford referenced the change in the law and the positions of the Circuits regarding *Blakely* and the certification of questions to the United States Supreme Court (*Booker/FanFan)*.

Further counsel specifically said that the firearm enhancement had been not charged in the case nor did Alford admit involvement with the firearm at his change of plea. The district court indicated as was spelled out by the Fifth Circuit in *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004), the Supreme Court on various occasions had upheld the guidelines as constitutional.

The district court noting that the Tenth Circuit had repeatedly upheld the sentencing guidelines stated, "I'm just, I'm certainly bound by *Blakely* but I am also bound by existing precedent by the United States Supreme Court that has not been overruled and by the law of this Circuit but it is still, still in force."

Further the district court went on to state "And I mean I don't want to suggest for a minute that the courts that have found the guidelines unconstitutional are activist judges, who simply jumped on a chance to get rid of a sentencing guideline formula that they never liked in the first place. I don't believe that at all. I am sure they have principled reasons for, for what they are doing; but I just don't feel like I can rush out and in light of, in light of authority that really limits my ability and rightfully so to find Acts of Congress unconstitutional, that I can rush out and do that. It has nothing to do with Mr. Alford personally or the facts of this case. **I feel constrained by my limited role as a District Judge to, make the jump that you want me to make.** (emphasis added) The court indicated that it was overruling Alford's objections to the Presentence Report based upon *Blakley*, ..."the sentencing guidelines are the law of the land in this court, and that the enhancement for the gun were properly included in the calculation."

Counsel argued that if Alford prevailed on the *Blakely* objection as to the firearm enhancement the guidelines would drop to a level 35 with guidelines of 168 to 210 months. The district court was reminded that Alford pled to a sentence with the maximum term of 20 years as there was no minimum mandatory. The plea agreement was worked out with the Government in full contemplation of Alford attempting to assist the Government in on going matters.

The district court was advised that Alford stumbled upon a mail-order facility in New York that was open to the public offering the pseudoephedrine over the counter enabling the purchase of multi-quantities of the pills necessary to manufacture methamphetamine. Alford's involvement was selling the pills as he could make a substantial profit on the pills. The company was not on the up and up and Alford provided evidence to the Government to be used against the company. The original cooperation agreement was negotiated between Mr. Gotcher and AUSA Gallant. Gotcher and AUSA Hess (Gallant's replacement) were negotiating as recent as the date before sentencing regarding the possibility of the Government filing a 5K1.1 departure motion.

The defense contended that Alford fulfilled his obligation with his assistance to the United States Government and that the assistance had been substantial. The only thing that changed in the scenario was AUSA Gallant was no longer handling the case having been deployed by the military. The fill-in AUSA Hess was not involved in the negotiation process with former counsel Mr. Gotcher. Alford went to New York on writ ad test and was there for a couple of months where he gave a deposition to the United States Attorney's Office in New York (Manhattan) against the company who sold him the pills.

The Government at sentencing offered into evidence a statement from Elliott Schachner, AUSA in the Eastern District of New York. After Alford's deposition he purportedly told Schachner he would not provide adverse information about individuals who "been straight with me". Alford's statement actually meant that there is no honor among drug offenders and that there was really no one to protect.